BRUNEI REPORTS

PUBLIC PROSECUTOR v. YATOR BIN BUNTA

[O.Cr.J. (O'Connor J.) April 7, 1987]

[Bandar Seri Begawan – Criminal Trial No. 32 of 1986]

Criminal Procedure – Murder – Whether confession made by accused while in police custody is admissible as evidence – Evidence Act, s.26 – Criminal Procedure Code, s.117(1).

Evidence – Whether confession made by accused while in police custody is admissible – Evidence Act, s. 26.

In this murder trial, the prosecution intended to lead evidence of a confession made by the defendant while he was in police custody.

It was submitted for the accused that as he was in police custody, section 26 of the Evidence Act applied so as to prohibit the confession being put in evidence. That section reads as follows:

> "Subject to any express provision contained in any written law, no confession made by any person whilst he is in the custody of a police officer, unless it is made in the immediate presence of a magistrate, shall be proved as against such person."

The prosecution submitted that section 26 did not apply but rather section 117(1) of the Criminal Procedure Code applied. That section reads as follows:

> "In any criminal proceedings any statement made by any person whether it amounts to confession or not or is oral or is in writing made at any time whether before or after the person is charged and whether in the course of a police investigation or not by that person to or in the hearing of any police officer shall be admissible in evidence and, if that person tenders himself as a witness, any such statement may be used in cross-examination and for the purpose of impeaching his credit."

Held: there is no conflict between section 26 Evidence Act and section 117(1) Criminal Procedure Code. They are not only reconciliable but are complementary. Section 26 applies to a confession made by a person in custody when he makes it and section 117(1) applies when a statement is made by a person not in custody.

Cases referred to:

(1) *Public Prosecutor* v. *Emran bin Haji Md. Noor & Ors.* [1987] 1 M.L.J. v.
(2) *Public Prosecutor* v. *Zainal Abidin bin Ismail & Ors.* [1987] 2 M.L.J. 741.
(3) *Walton* v. *Bank of Nova Scotia* [1964] 1 O.R. 673.
(4) *Chorlton* v. *Lings* (1868) L.R. 4 C.P. 374.
(5) *Public Prosecutor* v. *Ng Goh Weng & Ors.* [1979] 1 M.L.J. 127.
(6) *Shanmugam* v. *Commissioner for Registration* [1962] A.C. 515 (P.C.)

CRIMINAL TRIAL.

Dayangku Zabaidah (Deputy Public Prosecutor) for Public Prosecutor.

David Clidero for the accused.

Cur. Adv. Vult.

O'Connor J.: In this murder trial the prosecution intended to lead evidence of a confession made by the defendant while he was in police custody. Objection was taken on a number of grounds, only one of which need be considered. I gave an oral ruling with reasons, and promised I would reduce it to writing.

It was submitted that as he was in police custody, section 26 of the Evidence Act applied so as to prohibit the confession being put in evidence. That section is as follows:

> "Subject to any express provision contained in any written law, no confession made by any person whilst he is in the custody of a police officer, unless it is made in the immediate presence of a magistrate, shall be proved as against such person."

Reliance was placed on the decision of Mr. Commissioner Garcia in *Public Prosecutor* v. *Emran bin Haji Md. Noor and Others,*[1] wherein he found that section 26 of the Evidence Act applied to such circumstances.

The prosecution submitted that section 26 did not apply, but rather section 117(1) of the Criminal Procedure Code applied. That reads:

> "In any criminal proceedings any statement made by any person, whether it amounts to confession or not or is oral or in writing, made at any time, whether before or after the person is charged and whether in the course of a police investigation or not, by that person to or in the hearing of any police officer shall be admissible in evidence and, if that person tenders himself as a witness, any such statement may be used in cross-examination and for the purpose of impeaching his credit."

Reliance was placed on the decision of the Chief Justice in *Public Prosecutor* v. *Zainal Abidin bin Ismail and Others*[2] wherein, after considering Mr. Commissioner Garcia's decision, the Chief Justice disagreed with it and held that in such circumstances section 117(1) of the Code applied.

Mr. Commissioner Garcia held that for section 117(1) to apply to a person in custody, one would have to imply that the words "any person" in that section included a person in custody. He held that therefore section 117 did not "expressly" apply to

a person in custody. He found an apparent conflict between section 26 and section 117(1). For the meaning of "express provision", he relied on the following passage from *Walton* v. *Bank of Nova Scotia*[3] at p. 682 where the meaning of the words "unless otherwise expressly provided" were considered:

"In my opinion the word 'expressly' is used in section 287 in this sense – meaning that a provision of the Act or instrument creating the corporation does not have the effect sought to be attributed to it unless it is stated in express and positive terms, directly and not merely by implication from the language used."

The Chief Justice considered the decision of Mr. Commissioner Garcia and disagreed with it. He pointed out that the judge did not have a full report of *Walton* v. *Bank of Nova Scotia.*[3] The Chief Justice cited *Chorlton* v. *Lings*[4] for the meaning of similar phraseology and quoted from that case, at p. 387, where Willes J. observed:

"It is not easy to conceive that the framer (of Lord Brougham's Act) when he used the word 'expressly' meant to suggest that what is necessarily or properly implied by language is not expressed by such language. It is clear that whatever the language used necessarily and naturally implies is expressed thereby."

Of course the word "expressed" may simply mean "stated". In that sense what Willes J. said is quite correct. However, in my view, where the words "expressly provided" or "express provision" are used, they are clearly not meaning simply "stated", but mean explicit or direct, in distinction to "implied". I agree with the author of *Bennions "Statutory Interpretation"* at p. 245, where he says that Willes J. put a strained construction on the phrase.

I have available to me the full report of *Walton* v. *Bank of Nova Scotia.*[3] It reveals that the court in that case expressly considered *Chorlton* v. *Lings,*[4] in this passage:

"I should like to add that *Chorlton* v. *Lings* (1868) L.R.4 C.P. 374, is not to be taken as an authority supporting the appellant's contention that the word 'expressly' used in a statute should generally be construed as meaning 'what is properly or necessarily implied by language'. The rule there laid down must be read in the light of the peculiar facts, for to have given the word 'expressly' the meaning contended for in that case would have resulted in the extension of the franchise to women contrary to the usage which had prevailed in England for centuries."

The Chief Justice went on to conclude that section 117 is incompatible with section 26 and that section 117 supersedes section 26.

I am not bound by either of those decisions. In *Public Prosecutor* v. *Ng Goh Weng and Others*[5], the Federal Court of Malaysia held, on similar legislation, that section 26 was overridden.

The authoritative meaning of the expression "express provision" was stated by the Privy Council in *Shanmugam* v. *Comr. for Registration,*[6] at p. 527, as follows:

"Their Lordships are of the view that it is correct to state that express provision is provision the applicability of which does not arise by inference ... To be 'express provision' with regard to something it is not necessary that that thing should be specially mentioned; it is sufficient that it is directly covered by the language, however broad the language may be which covers it so long as the applicability arises directly from the language used and not by inference therefrom."

Section 26 of the Evidence Act originated in the Indian Evidence Act. It came to Brunei by way of Malaya.

The Indian version did not have the introductory words "Subject to any express provision contained in any written law." Those words were first introduced in the Malayan version. They appear to be intended to give a form of entrenchment to the section. The section gives a right to an accused person and the introductory words, which I emphasize, are an addition to the section as it first appeared, and are, in my view, intended to provide, as does an Interpretation Act, a guide to the construction of subsequent legislation that appears to bear on the same subject matter.

The origin of section 26 lay in a distrust of what may happen to persons in police custody. Such fears were no doubt well founded. One should consider with caution a suggestion that the fears crystallised in the section have been set aside by a side wind, repealed by inference. Section 26 is, in India, Malaysia, Brunei, and other places that have the Indian Evidence Act, or a derivative of it, probably the best known provision in all the laws on evidence. It is difficult to conceive that it would not have been in the mind of a person drafting section 117. Yet section 117 does not use a phrase such as "whether in police custody or not". It appears to me that this omission is of great significance when one considers the detailed attributes, set out in section 117, relating to the statement and its circumstances.

In section 117(1), the words "made at any time, whether before or after that person is charged" do not, in my opinion, relate to the circum-

stances of the person in relation to custody or not. They relate to a merely temporal matter, to the sequence, in relation to charging.

A person could be charged and served with a notice under section 117(3) whilst not in custody. Nothing in section 117, in my opinion, necessitates that the section applies to a person in custody.

In my view, contrary to that of Mr. Commissioner Garcia and the Chief Justice, there is no conflict between section 26 and section 117(1). They are not only reconciliable but are complementary. Section 26 applies to a confession made by a person in custody when he makes it, section 117(1) applies when a statement is made by a person not in custody.

Order accordingly.

Solicitors: *David Clidero & Co.*

YATOR BIN BUNTA v. PUBLIC PROSECUTOR

[A.Cr.J. (Roberts C.J.) July 31, 1987]

[Bandar Seri Begawan – Criminal Appeal No. 8 of 1987]

Criminal Procedure – Leave to appeal to Court of Appeal – Application for –Whether High Court has jurisdiction to grant leave – Supreme Court Act (Cap. 5) – Sarawak, North Borneo and Brunei (Courts) Order in Council 1951.

The applicant, Yator Bin Bunta, was convicted of murder and possession of firearm on June 15 after a trial by Macdougall J. and two assessors and was sentenced to death.

He applied for leave to appeal to the Court of Appeal, Brunei.

Held, dismissing the application: unless the application for leave has been made at the close of a trial for a certificate of the trial judge under section 18(1)(b) of the 1951 Order in Council, it will have to be made to the Court of Appeal itself when it is in session.

Case referred to:

(1) *Salim Rashid* v. *Public Prosecutor* Criminal Appeal No. 139 of 1986.

APPLICATION FOR LEAVE.

Francis Chiew for the applicant.

Dayangku Zabaidah (Deputy Public Prosecutor) for the Public Prosecutor.

Cur. Adv. Vult.

Roberts C.J. : The applicant was convicted on June 15, after trial by Macdougall J. and two assessors, of murder and of possession of firearm and was sentenced to death.

By an application dated June 24 (and so within the prescribed period of 14 days), he seeks leave to appeal to the Court of Appeal against his conviction.

I have thought it advisable to set out in writing my reasons for rejecting the application. I do so not because the law is uncertain but because it is difficult to find.

The Supreme Court Act (Cap. 5), which came into force on September 1, 1963, established a Court of Appeal for Brunei, in place of the Court of Appeal of Sarawak, North Borneo and Brunei.

The jurisdiction of the Court of Appeal is set out in section 6(6) :

"The Court of Appeal shall have the jurisdiction, powers, duties and authority:

(a) vested, immediately before the coming into force of this Act, in the Court of Appeal of Sarawak, North Borneo and Brunei so far as such jurisdiction, powers, duties and authority:

(i) are derived from any law in force in Brunei immediately before the coming into force of this Act; and

(ii) are not affected for the time being by any written law mentioned in paragraph (b); and

(b) conferred and imposed on the Court of Appeal by this Act and by any other written law enacted or made after the coming into force of this Act."

The effect of this subsection was therefore to continue the jurisdiction and powers of the previous court until these were replaced by Brunei laws.

In relation to civil proceedings, the Brunei High Court (Civil Procedure) Rules 1970 made provision for appeals in such matters to the Court of Appeal and revoked the various rules governing such proceedings which had been made under the Sarawak, North Borneo and Brunei (Courts) Order in Council 1951.

No similar provision has been made in relation to criminal appeals to the Court of Appeal. These continue to be dealt with under the 1951 Order in Council which, unfortunately, has not been included in the 1984 Revised Edition of the Laws of Brunei.